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—IN THE—

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 232.

WESTERN TIE AND TIMBER CO., APPELLANT,

vs.

BEN A. BROWN, TRUSTEE, APPELLEE.

STATEMENT, BRIEF AND ARGUMENT FOR THE APPELLEE.

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H. L. PONDER,
M. M. STUCKEY,
S. M. STUCKEY,
For Appellee.

JOHN M. MOORE,
Of Counsel.

HERALD PRINTING CO. NEWPORT.

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STATEMENT.

The record in this case is very short, and the facts are all in the Transcript of Record, pages 7 and 8, so it is unnecessary to repeat them here.

BRIEF.

I.

This Court does not have jurisdiction of this appeal.

Hutchinson vs. Otis, 123 Fed. 14.

Denver National Bank vs. Klug, 186 U. S. 202.

Holden vs. Stratton, 191 U. S. 115.

Wherefore appellee asks that the appeal be dismissed.

II.

An intention on the part of the bankrupt to give a preference by means of a transfer he makes is not indespensible to the existance of a voidable preference.

Bankruptcy Act of 1898, Sections 60a, 60b, 57g, 32 Stat. 799.

Chap. 487, sections 12, 13.

Collier on Bankruptcy (4th Ed.) pages 387, 388, 389 and 537.

Swarts vs. Fourth National Bank 117 Fed. 1, 3, 4, 54 C. C. A. 387-89-90.

Opinion of Circuit Court of Appeals, Tr. p. 11.

III.

The sale of supplies by bankrupt to the laborers and the appellant deducting the amounts of them from the pay rolls and retaining same did not create an indebtedness from appellant to bankrupt, but was a voidable transfer of bankrupt's property and a preference, and was not a case of mutual debts to be set off the one against the other.

Act of 1898, Sec. 1, definition No. 25.

1b Sections 60a, 60b and 68.

In re Christainsen 101 Fed. 802.

In re Ryan 105 Fed. 760.

Libby vs. Hopkins 104 U. S. 303.

In the matter of Tacoma Shoe & Leather Co. 3 Nat. B. N. & Rep. 9.

Sawyer vs. Hoag 84 U. S. 610-22.

ARGUMENT.

In the cases cited by appellant as authority for this Court to assume jurisdiction of this cause, the question of jurisdiction was not raised or discussed, hence those cases are not authority on that point. From all that appears in the reports of the Pirie case and the New York County Bank case, cited by appellant, those cases might have reached this Court because the appeal was granted by one of the Justices of the Supreme Court. If that was done, then the Court had jurisdiction; but that could only be determined by an examination of the files in those cases, and that we have not had the opportunity of doing.

To take an appeal or writ of error from the Supreme Court of the State to the Supreme Court of the United States, it is not sufficient that an Act of Congress is to be construed, but a right must have been claimed under it which was denied by the State Court.

Rev. Stat. 709.

The cases cited by appellant in its brief are not in point, and most of them arose under acts substantially different from the one we are considering and are inapplicable, hence we shall not enter into a detailed discussion of the several cases cited. There is one, however, we shall note in passing and that is New York County Bank vs. Massey, 192 U. S. 138, because counsel seem to rely upon it to support their contention; but our reading of that case convinces us that it has no application to the case at bar whatever. The only point decided in that case is that a bank can set-off the amount it has deposited with it against a debt owing to it from its depositor. That case was correctly decided because a bank has a lien upon the balance of a general deposit account for all indebtedness due to it

from the depositor and for the further reason that the depositing of money in a bank subject to be checked out does not work a diminution of the assets of the depositor but such deposit is itself an asset.

It should be borne in mind that appellant in this case is not a bank.

It is true that the petition for the adjudication in bankruptcy was filed on the 24th day of February, 1903, and it is probably true that this cause must be determined by the amended act which was approved February 5th, 1903, although there is a case, in re Busby 124 Fed. 469 l. c. 471, which seems to hold that the law as it stood when the property was turned over is to govern.

The contention of the appellant in a great measure, as we take it, grows out of its misconstruction given to section 60 sub-div. b, in that it contends that the intention on the part of the bankrupt to give a preference must appear. While we believe only a reasonable cause to believe a preference was intended must appear and no further notice to the creditor than reasonable cause to believe is necessary.

We also differ from counsel for appellant as to what is really meant by a transfer. They seem to think the retaining of money due to the bankrupt on the store accounts was not a transfer of his property, while we think it was.

Nor do we think the facts in this case establish a case of mutual debts to be set off against each other. This is probably one of the first cases to reach this Court under the amendatory act of February 5th, 1903, and as precedents are lacking, this case must be decided on principle. We must constantly keep in mind the purpose and intendment of this entire law, which is

to distribute the unexempt property which the bankrupt has four months before the filing of the petition in bankruptcy, share and share alike, among his creditors. Only by doing this can justice be done. It is true the Court should give effect to all parts of the act if possible, but should not adopt a strained construction of the whole act to give effect to the doubtful wording of a single section.

"The letter killeth, but the spirit giveth light." —2 Cor. 3-6.

A transfer is defined in the act itself, Chap. 1, page 15, defination No. 25: "Transfer shall include the sale and every other and different mode of disposing of or parting with property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security." In view of this definition in the very law itself, it could hardly be argued that the retaining money due to the bankrupt on the store accounts, for supplies sold and delivered by the bankrupt to the laborers, was not a transfer of his property. In Pirie vs. Chicago Title & Trust Co. 182 U. S. 438, definition No. 25 was given a very broad application, even more so than we are contending for here.

It is now settled beyond controversy that at the time of these transfers the appellant company knew that Harrison was insolvent and intended by retaining these amounts to secure to itself a preference over the other creditors of the insolvent. Tr. p. 7. Finding of Fact No. 6.

There can be no question either but that the appellant by retaining these amounts for supplies within the four months prior to the filing of the petition obtained a preference because the effect of so doing

was to enable it to secure a greater per cent of its debt than any other creditor of the same class. Sec. 60a.

Collier on Bankruptcy (4th Ed.) at page 387 in treating of Sec. 57 sub-div. g of the original act says:

"Preference claims. Sub Sec. 8 has been as much discussed as any clause in the present law. The former statute denied allowance to any claim filed by a creditor who accepted a preference, 'having reasonable cause to believe that the same was made or given by a debtor contrary to the provisions of the act,' nor could any dividend be paid on such a debt until the creditor had surrendered his advantage. The words quoted do not appear in the (original of) the present act. Further the defination of preference was by shifting of clauses, while the bill was in committee so changed as to lead to the ruling that any payment by debtor or creditor after, though without actual knowledge of insolvency, was a preference, even though lacking in intent, and made years before.

Pirie vs. Chicago Title & Trust Co., 182 U. S. 438, settled the matter. After it all payments subsequent to insolvency were preferences, the surrender of which was required before the the claim of the creditor so preferred could be allowed."

Again Collier on Bankruptcy, (4th. Ed.) 388. "The amendment of 1903. The conditions resulting from the new doctrine—a reversal of the settled policy of all bankruptcy laws to protect the transactions in due course, even up to the moment of bankruptcy—were so unsatisfactory to business men and disastrous to the creditors that the demand for remedial legislation was practically unanimous. Congress has responded by amendments (1) making it certain that no transaction more than four months before the bankruptcy is a

preference; and (2) limiting that which must be surrendered as a condition prescedent to proving a debt to (a) preferences that are voidable under Section 60, sub-div. b; and (b) advantages possessed by creditors to whom conveyances, transfers, assignments or incumbrances void or voidable under Section 57 sub. div. e have been made or given."

"Meaning of the amendments. Considered broadly, sub-section g seems now to mean what the 'protected transactions' clauses of the English system have meant for nearly two centuries. He who has obtained an advantage over his creditors in any of the ways indicated in the present law, and only such as one must hereafter surrender his advantage before his claim can be filed or allowed."

Again, on page 389 he says: "Amendments in actual practice. The effect of the change in section 57 g will be to limit objections to the allowance of claims on the ground of preference to such transactions as are void or voidable under Section 60b or 67e." And further on he says: "If not voidable under Section 60b a preference need not be surrendered. Reasonable cause to believe a preference must appear; an intention to prefer need not," and thus it is written, Section 60b, "If a bankrupt shall give a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Now in order to arrive at as to whether this action comes under the ban of the law, we take Sec. 60a and Sec. 60b together. Section 60a defines a preference as follows: "Person shall be deemed to have given a

preference if being insolvent, he has within four months before the filing of the petition made a transfer of any of his property, and the effect of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." There is no dispute as to the insolvency, nor as to the time when the credits were made as being within four months. It is also obvious that to permit appellant to retain these amounts, the effect will be to enable it to obtain a greater percentage of its debt, than other creditors of the same class, and under the finding of facts it is now beyond dispute that appellant had reasonable cause to believe a preference intended. We thus find the transaction under the ban of every clause of the law and unquestionably voidable.

Collier on Bankruptcy, 4th ed., page 537, says:

Effect of amendment on preferences:—"It follows from what has already been said before, that 57g, being one of administration only, the new rule, i. e., the reverse of Pirie vs. Chicago T. & T. Co., 182 U. S. 438 will apply to all cases begun after February, 1903. The changes in sections 60a and 60b, are largely those of transposition, only in re Dilling, 124 Fed. 852, the ruling in the Pirie case is followed, and incidentally it is held that the reverse would be the rule in cases arising since the amendment."

In the case at bar there was an attempt to substitute debtors, with the intent, as the Court of Appeals found, to prefer it to other creditors; there was no debt in fact due from the apellant to the bankrupt. And it may be explained in this way, the appellant was indebted to certain laborers for making, rafting and hauling ties, the amount of which was shown in the bi-weekly statement sent to the appellant by the bankrupt. This

statement also showed the amount of supplies sold by the bankrupt on a credit to the laborers, when the checks were to be sent by the appellant to the laborers for the amount of their services, the appellant first deducted the amounts due from the several laborers to the bankrupt and forwarded a check for the difference with the implied promise to the laborers that it would turn over the difference to the bankrupt in payment of the debt owing by the laborers for supplies to the bankrupt. Now this was not a debt owing by the appellant to the bankrupt, on which he could maintain an action if the appellant failed to turn over to the bankrupt in payment of the laborers' debts, and the bankrupt could only have this action against the laborers, who were his real debtors, and not against the appellant, who was the debtor of the laborers, and only held these several sums in trust for the laborers, to be turned over to the bankrupt. This does not constitute the transaction then, between the bankrupt and the appellant, mutual debts which could be set off one against the other.

The principle involved, in re Christainsen, 101 Fed. 802, we believe control here, There it is held that a payment of money to apply upon a debt, is a transfer of property and if made by an insolvent debtor with the effect of enabling the creditor to obtain a greater portion of his debt thrn the other creditors constitutes a preference. And that where a trustee in bankruptcy opposes the allowance of a claim filed by a creditor based upon an open account for goods sold by him to the bankrupt, on the ground that the creditors has received preferences, which he has not surrendered in the way of payment to apply on such accounts, the creditor cannot set off against the trustee's demand for the surrender of such preferences the amount due for goods sold, such a case not being one of mutual debts or mu-

tual credits between the estate of a bankrupt and a creditor. To the same effect is

In re Rryan, 105 Eed. 760.

In Libby vs. Hopkins 104 U. S. 303, the doctrine of set off is discussed. In that case the facts were that one person was indebted to another by a note secured by mortgage annd on an account. The first person sent the second person money with instructions to ap ply it on the note. Shortly thereafter the first person was adjudged a bankrupt. It was held that the money was received by the second person in trust to apply it persuant to instructions, and having refused to conform to them, he could not set it off against the account, but was liable therefor to the assignee in bankruptcy of the first person. Further on in the decision "the refusal of the person to apply them according to instructions did not change the relation of the parties to this fund. It did not make that a "debt" which before such refusal was a trust. To so hold would be to permit a trustee to better his condition by a refusal to execute a trust which he has assumed," and further on they say, "in our act 1867, the term credit and debts are used as correlative. What is a debt on one side is a credit on the other, so that the term credits can have no broader meaning than the term debts. We find no warrant in the language of the section or its context for extending the term credits so as to include trusts. Generally we know that credits and trusts are not synonomous terms. They have distinct and well settled meanings. To authorize a set off there must be mutual credits or mutual debts.

And our contention here, is that the appellant never did owe the bankrupt anything, hence there could be no mutual debts. So there could be no set off.

In Sawyer vs. Hoag 84 U. S, 610 is a case involving the doctrine of set off. At page 622 the court said: "The debts must be mutual; must be in the same right."

Can it be said from the facts in this case that the debts in the case at bar were mutual, and in the same right! We think not. The laborers owed the bankrupt and the appellant owed the laborers. These amounts were held by the appellant under the implied promise to the laborers to pay them to the bankrupt to be applied on certain accounts. As we take it, the appellant held it in trust, and not as a mutual debt owing by it to the bankrupt.

In the matter of the Tacoma Shoe & Leather Co. 3 Nat. B., News & Rep. 9, is a case that seems to be in point. In this case a trustee filed a petition asking for an order against the Fidelity Trust Co., a bank, asking it to show cause why it should not surrender certain sums of money had on deposit by it at the time the trustee took charge, and a further sum alleged by the trustee to have been collected by it upon a draft deposited with it for collection. The bank answered and pleaded that the bankrupt owed it a certain note and interest, and sought to set off, one against the other. The transfer in this case was made after the adjudication in bankruptcy. The Court held that notice of insolvency, under section 68, was a bar to a counter claim. In this case it was held that a set off, or counter claim, could not be allowed on favor of any debtor of the bankrupt, which was transferred to him after the filing of the petition or within four months before such filing, with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy.

As before remarked, the appellant had full notice of the insolvency of the bankrupt Harrison, in the case

at bar, during all the time covered by the transactions in question here.

With the four months before the filing of the petition the supplies were a part of the estate of the insolvent Harrison. At the end of the four months they had been converted into ties, which were a part of the property of the appellant company. The latter had received in the ties the value of $2,210.73, which had been transferred to it from the estate of Harrison, and for which it had paid nothing to the workmen or to Harrison, except by means of the credit it had given to Harrison upon its claims against him. But every transfer of his property by an insolvent, within four months of the filing of the petition in bankruptcy, which has the effect to enable any one of his creditors to obtain a greater percentage of his debt out of the property of the insolvent than any other of such creditors of the same class, is a preference. The transfer of the supplies which were a part of the property of Harrison enabled the Tie Company to obtain about 10 per cent more of its debt out of his estate than other creditors of its class and thus obtain for itself a preference.

The law draws a line through the account between the insolvent and his creditors four months before the petition in bankruptcy is filed. All mutual debts and credits, which accrue prior to that time, may be set off against each other. Credits to the insolvent, accruing subsequent to that time which constitute voidable preferences, under section 60, are excepted by that section from the subsequent provisions, found in section 68, and they can not be used to offset debts, which accrue prior to that date.

Under the facts in the case at bar, we contend that there was a voidable preference obtained by the appellant, and that the same cannot be used as an offset.

We, therefore, respectfully submit that this Court has not jurisdiction of this case and this appeal should be dismissed, but should the Court hold otherwise, we submit that the finding of the Referee and the decree of the District Court, as modified and affirmed by the Circuit Court of Appeals for the Eighth Circuit, is cor rect and should in all things be affirmed, together with cost, for which we ever pray.

Respectfully submitted,

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